United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1212

United States Court of Appeals For the Second Circuit

THE UNITED STATES OF AMERICA,

Appellee,

-against-

ARMANDO ESPARZA, DELFIN "LEO" GONZALEZ, HECTOR CHRISTIAN,

Appellants.

Appeal From The United States District Court For The Eastern District Of New York

BRIEF FOR APPELLANT ARMANDO ESPARZA

STEPHEN R. LAIFER
Attorney for Appellant, Armando Esparza
16 Court Street
Brooklyn, N.Y. 11241
(212) 855-8855

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone (212) 447-5358

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Appellee,

-against-

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John Doe, a/k/a "LEO GONZALEZ",
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT ARMANDO ESPARZA

STATEMENT

The appellant, ARMANDO ESPARZA, appeals from a judgment rendered in the United States District Court for the Eastern District of New York (Chief Judge Jacob Mishler) convicting him of the crimes of conspiracy, possession with intent to distribute and distribution of a quantity of cocaine, in violation of Title 21, United States Code, Sections 841 (a)(1), 846 and Title 18, United States Code, Section 2. (A1-A2).*

Proceedings were begun when the appellant was indicted in the Eastern District of New York. The indictment alleged three

*Numbers in parenthesis preceeded by letter A refer to pagination of the Appellant's appendix.

(3) counts.

The first count charged the appellant and two (2) co-defendants with a conspiracy on or about and between May 16, 1975 and May 31, 1975 to violate 21USC 841 (a)(1); the second count charged the appellant and the co-defendant Gonzalez that on or about May 29,1975 they violated 21 USC 841 (a)(1) and 18 USC 2, the third count charged the appellant and the co-defendant Gonzalez that on or about May 29, 1975 they violated 21 USC 841 (a)(1) and 18 USC 2.

A jury trial was begun on January 19, 1976 and continued till January 27, 1976 when defendants motion for a mistrial was granted after the jury indicated it could not reach a verdict. A second trial of the matter was begun on February 23, 1976 and ended on February 27, 1976. The jury returned verdicts of guilty as to all defendants as to each count charged.

A STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

A. Was the introduction of testimony into evidence of a prior similar act of the appellant Esparza reversible error?

B. Was the prosecutor's comment during summation concerning the Appellant's prior similar act reversible error?

STATEMENT OF THE CASE AGAINST THE APPELLANT"

The Government's case was presented through the testimony of: Louis Rodriquez, a co-conspirator who after being arrested on May 22, 1975 for an unrelated sale of cocaine agreed to cooperate with the Government and was given immunity from

prosecution in the case at bar; Special Agents Nicholas Alleva and Alfred Cavuto who purchased the cocaine; Special Agent Paul Sennett, assigned to surveillance and Special Agent Vincent Guadagnino, who testified to the Appellant Esparza's prior similar act..

At trial the government's case established that on April 21, 1975, approximately one month after meeting the defendant Christian at the Trinitas Bar, Louis Rodriquez introduced Christian to Agent Alleva. The meeting, which took place in the Roaring 20's Bar, resulted in a conversation between Christian and Alleva, wherein Christian indicated he could provide large quantities of cocaine and Alleva indicated that he would first purchase 1/8 of a kilo and then more if the quality was good. (Although as early as March, 1975, Rodriquez had a feeling that Alleva was an agent, he testified that at this time he only knew him as a person dealing in narcotics).(T 33,34,38,212,214).**

On May 15, 1975 Christian called Rodriquez at the latter's place of business and told him that he had merchandise available for the nextday if his people want it. That night Rodriquez met Christian at the Trinitas Bar, agreed to contact his people and told Christian to call him noon the next day (T pages 39,40).

On May 16, 1975 after Rodriquez had contacted Alleva and was told to make the arrangements, Christian called Rodriquez and a meeting was set up for that night between 9:30-10:00 P.M. at the Toll Gate Bar (T40,216).

**Numbers in parenthesis preceeded by Letter T refer to transcript of trial testimony.

That night Rodriquez left work and met Christian at Trinito's Bar to check if the deal was going through. He thereafter met agents Alleva and Cavuto at the Toll Gate Bar. Cavuto was introduced as Alleva's nephew and as the person who would test the cocaine (T41-43, 217). After waiting for some period of time, Rodriquez called Christian at the Trinito's Bar. Thereafter, Rodriquez, Alleva and Cavuto went to the Trinito's Bar where they met Christian and waited for the cocaine (T43-44).

Sometime thereafter, the co-defendant Leo Gonzalez arrived and was introduced by Christian as one of the fellows suppose to deliver the merchandise and by Rodriquez as the partner of the source. (T44,220)

Gonzalez informed them that the fellow with the package was driving right behind him and that he should be there any minute. After waiting for a period of time without anyone showing up, the men left the bar. Rodriquez gave Gonzalez his business card and Gonzalez gave Alleva a telephone number. (T45-46)

On May 17, 1975 Rodriquez received a call from Gonzalez to set up a meeting with"the source, the guy with the cocaine." At 3:00 P.M. that day Gonzalez arrived at Rodriquez's place of business with the Appellant Esparza. Esparza told Rodriquez that the fellows got there late, that the cocaine was not that good and that he was waiting for a shipment to come in. Esparza gave him a telephone number of a social club he said he owned and Rodriquez gave Esparza his business card and told him to call when the shipment came in. (T48-49)

On May 19, 1975 Rodriquez called Alleva, informed him of what transpired on May 17th and gave him the telephone number which was given to him by Esparza (T223-224).

On May 22, 1975 after his arrest for arranging a sale of one pound of cocaine with Alleva, Rodriquez agreed to give his full cooperation with the agents in future deals with people he already introduced to them. Rodriquez further testified that in exchange for his plea to a telephone count on the May 22 sale, and his agreement to give testimony, he received immunity from prosecution on a March 24, 1975 sale of one pound of cocaine, mid April 1974 sale of one ounce of cocaine, the conspiracy charge in the case at bar and his dealings in 1974 when he went to Florida to purchase narcotics for undercover N. Y. C. Police (T26-28, 31-33, 63, 64-65, 103-106).

On May 27, 1975, Rodriquez had a telephone conversation with Gonzalez and Esparza wherein Esparza told him he had good merchandise and wanted to make a deal. Furthermore he told Rodriquez to make all arrangments through Gonzalez. After calling Alleva, Rodriquez contacted Gonzalez and made arrangments for a meeting on May 29, 1975 at 9:30-10:00 P.M. at the Toll Gate Bar (T52-53, 227).

On May 29, 1975 at 9:20 P.M. Rodriquez arrived at the Toll Gate Bar. Shortly thereafter Gonzalez arrived and then left telling Rodriquez he had to go up the street to pick up the package. At this time Rodriquez saw Gonzalez's car, a 1968 Pontiac GTO which remained parked at the curb in front of the bar (T54).

At 9:30 P.M., Alleva and Cavuto arrived at the bar and met Rodriguez who told them that Gonzalez went up the street to get the package. According to conflicting prosecution testimony, approximately 5-50 minutes later Gonzalez returned, said he had the package but that he didn't want to do it cause there were strange cars in the area.(T55,227,233 382)

Thereafter, Gonzalez and Cavuto left the bar and entered Gonzalez's car. Cavuto tested the cocaine in the back seat after Gonzalez removed the package from under the dash in the front. (T55, 233,383,384)

After 5-15 minutes Gonzalez and Cavuto returned to the bar. Alleva told Gonzalez that everything was OK and they should go get the money. At this time Alleva,Cavuto and Gonzalez left the bar. Alleva and Cavuto walked up the street. After getting the money, Alleva and Cavuto crossed the street and met Gonzalez. Leaving Cavuto on the corner, Alleva and Gonzalez walked a short distance away and exchanged the cocaine for themoney. Alleva and Cavuto then walked back to the bar and upon entering the bar, Alleva saw Gonzalez getting into a green Cadillac which was being driven by Esparza.(T56-57, 233-237)

Special Agent Paul Sennett testified that on May 29, 1975 he was assigned to surveillance in the vicinity of the Toll Gate Bar which began after 9:00 P.M. Although he didn't see the defendant Gonzalez leave the bar, at 9:30 he saw Agents Alleva and Cavuto arrive. (T 424-26,448,450)

At about 10:20 P. M. he observed a medium green Cadillac bearing license plate number 934 YAI and registered to Armando Esparza, doubled park approximately 25' - 30' in front of him. The defendant Gonzalez exited the car and went directly into the Toll Gate Bar. (T427,435, 451-2, 454, 456) The Caddy went around the block and then parked. The witness identified the appellant Esparza as the driver(T428,430)

Although Sennett initially testified that after the deal Gonzalez was walking in front of the Agents, entered the Caddy, drove off and then the agents returned to the bar, he thereafter corrected this by indicating that Gonzalez was walking behind the agents.(T434, 443, 462-463)

An attempt was made by two Government vehicles to follow the Caddy but it was lost. (T468-64A)

Special Agent Vincent Guadagnino testified as to the facts surrounding a sale of 25.5 grams of heroin, made on July 8, 1969, from Esparza to himself. (T473-482) (A6-A17)

The Appellant Esparza did not testify at trial. The only evidence introduced on behalf of Esparza's defense was that of a conversation recorded on November, 1974 between Louis Rodriquez and New York City Police Officer Stephen Felsen. (T492-533)

POINT I

The Introduction of Testimony of the Appellant Esparza's prior similar Act was Reversible Error.

In UNITED STATES v. BRETTHOLZ, 485 F2d 483, 487 (2d Cir, 1973) this Court reasserted the position

> "...that evidence of prior similar acts is admissible for all purposes except to show the criminal character or disposition of the defendant"

Noting the inherently prejudicial character of said evidence, the Court went on to state that

> "...In ruling on the admissibility of such evidence, the trial judge is required to balance all of the relevant factors to determine whether the probative value of the evidence outweighs its prejudicial character."

and thereafter enumerated various factors to be taken into consideration by the trial judge. U.S. v. BRETTHOLZ, supra. page 487.

Thus the issue to be determined by this Court is whether under the facts of this case the trial court abused its discretion in determining that the probative value of Agent Guadagnino's testimony regarding Esparza's seven (7) year old heroin sale outweighed its prejudicial effect upon the jury.

It is the Appellant's contention that the probative value did not outweigh its prejudicial effect when considered in light of the facts of the case and thus denied him a fair trial.

As indicated in BRETTHOLZ, the various factors to be

considered in determining the admissibility of said evidence are

> "...(1) the actual need for the other-crimes evidence in light of the issues and the other evidence available to the prosecution, (2) the convincingness of the evidence that the other crimes were committed and that the accused was the actor,... (3) The strength or weakness of the other crimes evidence in supporting the issue, (and 4) the degree to which the jury will probably be roused by the evidence to overmastering hostility." (underlining supplied) U.S. v. BRETTHOLZ, supra, page 487; citing McCORMICK, EVIDENCE § 190 page 447, 453 and U. S. v. BYRD 352 F.2d 570, 574, (2d Cir.1965)

In the case at bar, the testimony was admitted on the limited issue of intent and the jury was so instructed (T 478-480, T752-754). As noted in BRETTHOLZ, supra 488

> "...Intent... is placed in issue in the case at trial, either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense" UNITED STATES v. DeCICCO, 435 F2d 478,483 (2 Cir. 1970)."

Although the Appellant readily conceeds that in the case at bar intent was placed in issue by the nature of the proof required to be establish by the prosecution, when viewed in light of the other evidence available to the prosecution and which was introduced at trial, the testimony concerning the Appellant's prior similar act was merely cumulative and unnecessary to establish his intent.

At trial, prosecution witness Rodriquez testified that on May 17th, Gonzalez told him that he would meet with "the source, the guy with the cocain" and that later in the day he met with Gonzalez and Esparza. That at this time he had a conversation

with Esparza wherein Esparza indicated to him full knowledge of the sale that did not materialize the night before. Furthermore, Rodriquez testified that on May 27th, two days before the actual sale took place, it was Esparza who told him that he had good merchandise, that he wanted to make a deal and that all arrangements should be made through Gonzalez. (T48-49, T52-53).

Clearly, by reason of the above, although intent was an issue at trial, there was no need to use the prior heroin sale to establish it.

Noting at this time that the Appellant's conviction herein was from a retrial (the first trial ended in a hung jury), the trial court in determining the probative value of said testimony anticipated the defenses that could possibly be made at trial. (A-4,A-7,T474).

The Court found that "particularly in light of the examination and the apparent claim and argumen[illegible] was made or could be made that even if he (Esparza) was in the area, all he did was drove Mr. Gonzalez there and drove him away without knowing that it was a drug transaction, is a prior similar act in point" A-7(T474)

Although the trial court's reasoning logically flows from the anticipated defense, the court's findings are inconsistent with and not supported by the testimony introduced at trial.

Initially it must be noted that the Appellant Esparza did not testify at either the first or second trial. As indicated in the record, other than introducing testimony of a taped conversation between prosecution witness Rodriquez and a New York City

Police officer, wherein Rodriquez was recorded negotiating a large scale cocaine purchase in 1974, no other testimony or evidence was introduced on behalf of Esparza other than to impeach Rodriquez's credibility. (T492-533)

In contrast to this, is the defense presented on behalf of the co-defendant Gonzalez who testified at both the first and second trial. His testimony, if credited by the jury tended to establish that he did not know what was contained in the package he transferred to Agent Alleva and that he only acted as the agent of Rodriquez. Surely his defense of lack of knowledge and intent cannot and should not be used as the basis for introducing Esparza's prior heroin sale on the question of Esparza's intent. Esparza's defense rested on the issue of credibility, not on lack of intent or knowledge.

Furthermore, Gonzalez's added testimony which refuted that of the Government's witnesses wherein it was alleged that Esparza was present in the area and met with Gonzalez at the time of the transaction tends to negate the position by Esparza that he only drove Gonzalez there and back without knowledge that a drug transaction was taking place.

As the above indicates, intent was not placed in issue by the Appellant by way of defense. Thus, under the facts of this case, where there was no actual need to introduce the prior heroin sale to establish intent as part of the Government's direct case together with the fact that Appellant did not raise the issue of intent in his defense, the trial court abused its discretion in determining that the probative value of Guadagnino's testimony as

to Esparza's 1969 heroin sale outweighed its prejudicial effect.

With respect to the convincingness of the evidence that the 1969 heroin sale was committed and that the Appellant was the actor, this fact is readily conceded by the Appellant.

With respect to the strength or weakness of the 1969 heroin sale in supporting the issue of intent, it is the Appellant's contention that said testimony was of relatively weak nature in support of establishing intent. First, the drug transferred in 1969 was heroin while the drug in the case at bar was cocaine, second the heroin sale in 1969 was made directly by Esparza to the Agent while in the case at bar middlemen were involved, third, the heroin sale in 1969 did not have someone test the drug, while in the case at bar, the drug was first tested by Cavuto, fourth, the method of transfer in the 1969 heroin sale was totally dissimilar to the method employed in the case at bar except for the limited use of an automobile and fifth, the remoteness of the seven (7) year old heroin sale as indicating knowledge on the part of esparza that the acts observed in 1975, which were consistent with innocent conduct, were in fact a drug sale.

As stated in BRETTHOLZ, the hereinbefore noted facts must all be balanced against "the degree to which the jury will probable be roused by the evidence to over-mastering hostility". BRETTHOLZ, supra, page 484

Anticipating the answering brief by the United States Attorney the case at bar is clearly distinguishable from UNITED STATES V. BRETTHOLZ, 485 F2d 483 in that in the BRETTHOLZ case this Court found that the issue of intent was an element of the defense case for each defendant and that the prior acts of BRETTHOLZ involved a situation virtually identical to the transaction for which appellants were indicted. Additionally, the testimony concerning the prior similar acts were elicited from a co-defendant who stated that he bought cocaine from Brettholz on ten occasions within a year prior to the transaction in question. BRETTHOLZ, supra, pages 487, 488.

Similarly, in UNITED STATES V. PAPADAKIS, 510 F 2d 287, (2d Cir 1975), Cert. denied 95 S.Ct. 1682, this Court found that the similar acts introduced into evidence showed the existence of a broader conspiracy to obstruct justice, of which the conspiracy charged against the appellant was only a part. Furthermore, this Court noted the convincing nature of the testimony in circumstantially establishing the corrupt agreement of the conspiracy charged and that at least one of the incidents was directly connected with the acts charged in the indictment. PAPADAKIS, supra, Pages 294, 295

In UNITED STATES V. BOZZA, 365 F 2d 206, (2d Cir.1966), this Court upheld the introduction of testimony of a prior similar act occurring approximately ten (10) days before

the offenses charged in the indictment due to its indispensable nature. As noted in Judge Friendly's decision,

> "the Fairview burglary had about as close a relationship to the offenses charged as can be imagined; indeed, if the evidence....had been omitted, the jury would have had only a truncated version of what was claimed to have occurred". BOZZA, supra pages 210,212,213,214

In UNITED STATES V. KNOHL, 379,F2d 427, (2d Cir. 1967) this Court held that in defendant's trial for obstructing justice, testimony of defendant's prior offenses was admissible to show that defendant was a large scale dealer on stolen securities and therefore had strong motive to induce a potential Grand Jury witness to perjure herself. Furthermore, this Court found that the testimony was relevant to show that the defendant knew that certain securities were stolen KNOHL, supra Page 438.

IN UNITED STATES V. DEATON, 381 F2d 114, (2d Cir 1967), this Court held that in defendants' trial for fraud, evidence of three similar transactions was admissible to prove defendant's fraudulent intent, noting tnat it was a crucial issue at trial, that at lease one of the transactions was part and parcel of the same transaction which constituted the offense charged, and that all three transactions were identical with the present case in that no loan was ever made. DEATON, Supra page 116-118

IN UNITED STATES V. WARREN, 453 F2d 738, (2d Cir.) cert denied 406 U.S. 944, this Court upheld the introduction

of evidence obtained in a search conducted a day after the filing of the indictment on the issue of intent and to negate the defense of entrapment which was raised by appellant. WARREN, Supra. Page 745

It is respectfully submitted, that under the facts of this case, the potential for prejudicing the Appellant for outweighs the probative value of said evidence. As noted in US, V. BYRD, Supra Page 574

> "It is generally recognized that there can be no complete assurance that the jury even under the best of instructions will strictly confine the use of this kind of evidence to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal act, probably committed the one with which he is actually charged".
> See also U.S. V. DeCICCO, 435 F2d 478, 483.

POINT II

The Prosecutor's Comment During Summation Concerning the Appellant's Prior Similar Act Was Reversible Error

Assuming arguendo, that this Court should find that testimony of the Appellant Esparza's prior similar act was properly introduced into evidence (although it is Appellant's continuing position that it was not), it is the Appellant's contention that during summation, the Prosecutor used said testimony to establish that the Appellant was a man of criminal character and therefore likely to commit the crime charged herein.

During summation, the Prosecutor made the following statement to the Jury:

> "I submit to you, ladies and gentlemen, that Mr. Esparza was no stranger to drug transactions. He knew how to handle himself, and he was a very cautious man.
>
> First of all he was not going to have anything to do with transporting the drugs himself or engaging directly in the sale of the drugs himself. Neither was he going to be anywhere near the location of this car where the drugs were concealed.
>
> Ladies and gentlemen, I submit to you that Mr. Esparza had learned his lesson. The last time that he had dealt, that he had cut out a middleman and dealt directly with a stranger, you learned that that stranger turned out to be a Government Agent.
>
> Mr. Laifer: Objection, Your Honor, I move for a mistrial.
>
> The Court: Overruled. Motion denied.

> Mrs. Amon: And that Government agent you learned was Vinny Guadagnino. And it wasn't necessary, ladies and gentlemen, for Mr. Esparza to take any unnecessary chances on this occasion because he had Leo Gonzalez to do that for him. Leo Gonzalez was his delivery-man." (T page 606-607)

As noted above, defense counsel's objection was overruled and the motion for a mistrial denied.

Reasserting the argument as set forth in Point I, it is clear that the above comments by the prosecutor regarding Esparza's prior similar act went far beyond the permissible limits for which said testimony was introduced.

Essentially, after assuring the Jury that "Mr. Esparza was no stranger to drug transactions" (underlining supplied), the Prosecutor alluded to the testimony of the Appellant's prior similar act as a learning experience, from which the Appellant learned "it wasn't necessary...to take any unnecessary chances on this occassion". The inference that the Appellant sold drugs before and thus is more likely to have committed this crime is clear and unmistaken. This is further emphasized and made more apparent by the later comments of the Prosecutor, wherein the Jury was properly told,

> "And when you are considering too, ladies and gentlemen, whether Mr.... what Mr. Esparza's intent was there, whether he was there unintentionally or whether he knew exactly what this transaction was about, I can ask you to consider the testimony that you heard from Vinnie Guadagnino." (T Page 628)

The above is in direct contrast to the initial comments

of the Prosecutor and permitted by the Court, wherein the Jury was told that the Appellant was not going to take unnecessary chances on this occassion because the last time he dealt with a stranger and cut out the middleman, you learned that that stranger turned out to be a Government Agent.

As a reading of the trial record indicates, the case against the appellant was presented mainly through the testimony of Prosecution Witness Rodriquez, whose credibility was subject to vigorous attack by defense counsel. By reason of this, the Prosecutor's comments during summation should not be considered harmless error and as such, the Appellant's conviction should be reversed.

POINT III

THE APPELLANT ESPARZA ADOPTS ALL POINTS AND ARGUMENTS OF CO-APPELLANTS THAT WOULD BE APPLICABLE TO HIM

CONCLUSION

THE APPELLANT'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED

Dated: Brooklyn, New York
July 19, 1976

Respectfully submitted,

STEPHEN R. LAIFER
Attorney for Appellant
ESPARZA
Office & P.O. Address
16 Court Street
Brooklyn, New York 11241
Tel. (212) 855-8855

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STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 290 Richmond Avenue, Staten Island, N.Y. 10302. That on the 15 day of July 197 deponent served the within brief upon:

U.S. Atty., Eastern Dist. of N.Y.

attorney(s) for

Appellee

in this action, at

225 Cadman Plaza East, Brooklyn, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 15
day of July, 197

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132645
Qualified in Richmond County
Commission Expires March 30, 1979